

In the Matter of)
)
Application by Qwest)
Communications)
International, Inc., for)
Provision of In- Region,) **WC Docket No. 02-314**
InterLATA Services in the)
States of Colorado, Idaho,)
Iowa, Montana, Nebraska,)
North Dakota, Utah,)
Washington, and Wyoming.

DATED: October 25, 2002

On September 30, 2002, Qwest Communications International, Inc. (Qwest), filed a joint application for authorization to provide in-region, interLATA service in nine states, one of which is Colorado. This is the second Colorado-related application filed by Qwest pursuant to § 271 of the federal Communications Act of 1934, as amended (the Act), 47 U.S.C. § 271.¹ On September 30, 2002, the Federal Communications Commission (Commission or FCC) issued a Public Notice concerning this nine-state application and asked for reply comments by October 25, 2002. The Colorado Public Utilities Commission (COPUC) now files its reply comments.

Numerous parties filed comments on October 15, 2002, including the COPUC. Those opposing the application, primarily Competitive Local Exchange Carriers (CLECs), raised several concerns. The COPUC addressed all but one² of these issues in the *COPUC Evaluation*, the *COPUC Reply Comments*, the *COPUC Supplemental Comments*, and the *COPUC Supplemental Reply Comments* filed in WC Docket No. 02-148 and previously incorporated into this docket by reference.³ For the reasons stated in those filings, which we will not repeat here, the commenter-raised issues are insufficient basis on which to deny the Qwest § 271 application.

There are two areas on which the COPUC will provide specific comment: (1) the unfiled agreements and (2) the AT&T Corp. (AT&T) assertion that it has discovered a

¹ The previous proceeding was WC Docket No. 02-148. Qwest withdrew that proceeding on September 10, 2002.

² Because the issue of Qwest's compliance with § 272(b)(2) of the Act arose after the COPUC had closed its investigation into Qwest's compliance with § 271, we did not address this issue. *See COPUC Comments* filed October 15, 2002, at 3.

³ *See id.* at 1.

previously-unknown total element long run incremental cost (TELRIC) “error” in the calculation of the COPUC’s unbundled network element (UNE) loop rates. *See* AT&T comments filed October 15, 2002, at 71-73.

Turning first to the unfiled agreements,⁴ there are two recent developments in the COPUC’s investigation into, and review of, unfiled agreements which may be interconnection agreements (ICAs).

In its review of the 11 applications filed by Qwest for approval of interconnection agreement amendments, the COPUC has issued a decision setting out its provisional definition of interconnection agreement and, using that definition, will review each of the Qwest-filed agreements.⁵ The COPUC will complete this review within the timeframe established in the Act.

The COPUC Staff has completed its informal investigation into the existence of unfiled agreements that may be ICAs. On October 16, 2002, COPUC Staff requested that the COPUC open a formal investigation docket; and the COPUC has agreed to do so.⁶ The investigation will include both written and oral agreements which might be ICAs.

⁴ These reply comments provide an update of the information contained in our October 15, 2002, comments at 3-4.

⁵ For a full discussion of the COPUC’s definition and for a timetable for resolution of the issues presented, *see COPUC Phase I Order* (appended to these reply comments as Attachment 1).

⁶ The *COPUC Order Opening Docket and Setting Procedural Schedule* will be submitted as Attachment 2 to these reply comments. We anticipate filing the order as an addendum to these reply comments.

The investigation, thus, will address the CLECs' concerns as stated in their comments, including the issue that oral agreements may exist which are ICAs, and will give all interested parties, including CLECs, the opportunity to participate as their interests may dictate.

The COPUC will now address the AT&T assertion that there is "an additional TELRIC error that inflates Qwest's Colorado UNE loop rates that AT&T only recently discovered." AT&T comments at 71. The alleged "error" is found in the calculation of Qwest's network operations costs⁷ and consists of two parts. For the reasons discussed below and in our previously-filed comments and decisions, this "error" provides no basis for determining that the Colorado UNE loop rates "fall[] outside of the range that the reasonable application of TELRIC principles would produce." *AT&T Corp. v. Federal Communications Commission*, 220 F.3d 607, 616 (D.C. Cir. 2000) (*AT&T*), cited with approval in *WorldCom, Inc. v. Federal Communications Commission*, Case No. 01-1198, slip. op. at 4 (D.C. Cir. Oct. 22, 2002) (*WorldCom*).

The first part of the "recently discovered" AT&T-asserted "error" was fully-litigated during the COPUC's costing and pricing proceeding, Docket No. 99A-577T. It is neither "recently discovered" nor an "error." As AT&T posits the issue, it involves the input used in the HAI 5.2a Model⁸ to reflect the costs of Qwest's network operations and our alleged failure to apply what AT&T considers to be the correct forward-looking network operations factor. AT&T comments at 71-72. Contrary to AT&T's statement,

⁷ These are the costs of operating and managing a local telecommunications network, which costs are not accounted for on a plant-specific basis.

⁸ In our costing and pricing proceeding, AT&T and WorldCom, Inc., sponsored this model and advocated its use for the calculation of wholesale loop rates. We adopted the

we addressed this precise issue in our *Commission Order*⁹ at 62-63. Despite having the opportunity to do so, AT&T did not seek reconsideration of our determination of the input value.¹⁰ Thus, in our costing and pricing proceeding, AT&T accepted our decision. It cannot raise this already-litigated issue now, before this Commission.

The second part of the AT&T-asserted “error” is our adoption of “a \$0.70 recurring loop additive to account for other network operations costs -- *i.e.*, power and testing.” AT&T comments at 73. This issue was never raised before the COPUC. It cannot be raised now, for the first time, in this proceeding.

As found by the United States Court of Appeals for the District of Columbia Circuit:

because the FCC has only 90 days to approve or [to] reject a § 271 application, it cannot independently determine the TELRIC compliance of an ILEC’s UNE rates. Rather, the FCC defers to the determinations of the state agencies who “possess[] a considerable degree of expertise” and who typically perform “a significant amount of background work” during the rate determinations. Thus, the FCC need only ensure that the state proceedings “comply with basic TELRIC principles” and are not infected with clear factual errors so “substantial that the end result falls outside of the range that the reasonable application of TELRIC principles would produce.”

HAI 5.2a Model for the calculation of monthly recurring loop rates, using COPUC-approved inputs.

⁹ *Commission Order* in Docket No. 99A-577T, *Qwest Application* at App. C, Vol. 2, Tab 10.

¹⁰ *See Ruling on Applications for Rehearing, Reargument, or Reconsideration* in Docket No. 99A-577T, *Qwest Application* at App. C, Vol. 2, Tab 11, and *Decision on Applications for Rehearing, Reargument, or Reconsideration* in Docket No. 99A-577T, *Qwest Application* at App. C, Vol. 2, Tab 12. Having litigated this precise issue, AT&T was certainly aware of the input and could have sought reconsideration. As perusal of the referenced decisions shows, AT&T did not seek reconsideration of the COPUC-determined input for network operations expenses.

WorldCom, slip op. at 4 (internal citations omitted). Further, that court has held that “TELRIC is not a single rate but a ratemaking methodology that may yield a rather broad range of rates.” *Id.*, slip op. at 8, and cases cited there.

The rates which we determined in our costing and pricing proceeding, including the UNE loop rates derived using the inputs which AT&T questions, unequivocally meet this standard. Nothing proffered by AT&T establishes that the Colorado rates do not fall squarely within the zone of reasonableness.

The COPUC urges the Commission to approve the § 271 application of Qwest, at least insofar as it relates to Colorado. Nothing in the application or in the comments causes us to change our recommendation that this Commission should approve Qwest’s application to provide in-region, interLATA service in Colorado. The record before the COPUC supports our determination that the local telecommunications market in Colorado is, and will remain, open to competition and that Qwest has met the requirements of § 271 of the Act. There is no reason to deprive Colorado citizens of the benefits of increased long distance and local exchange competition that will be spurred by Qwest’s entry into the long distance market. The Commission should approve the application and permit Qwest to enter the long distance market.

The Commission should grant the Qwest § 271 application without further delay.

(S E A L)

Respectfully submitted,

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Chairman

Commissioner

Commissioner

Decision No. C02-1183

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 96A-287T

IN THE MATTER OF THE PETITION OF MFS COMMUNICATIONS COMPANY, INC., FOR ARBITRATION PURSUANT TO 47 U.S.C. § 252(B) OF INTERCONNECTION RATES, TERMS AND CONDITIONS WITH U S WEST COMMUNICATIONS, INC.

DOCKET NO. 97T-507

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND GLOBAL CROSSING LOCAL SERVICES, INC. F/K/A FRONTIER LOCAL SERVICES, INC.

DOCKET NO. 98T-042

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND NEXTLINK COLORADO, L.L.C.

DOCKET NO. 98T-519

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND ADVANCED TELECOM GROUP, INC.

DOCKET NO. 99T-040

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND ERNEST COMMUNICATIONS, INC.

DOCKET NO. 99T-067

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT
BETWEEN U S WEST COMMUNICATIONS, INC. AND DIECA COMMUNICATIONS,
INC. D/B/A COVAD COMMUNICATIONS COMPANY

DOCKET NO. 99T-598

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT
BETWEEN U S WEST COMMUNICATIONS, INC. AND KINGS DEER TELEPHONE
COMPANY, INC.

DOCKET NO. 00T-064

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT
BETWEEN U S WEST COMMUNICATIONS, INC. AND ELECTRO-TEL, INC.

DOCKET NO. 00T-277

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT
BETWEEN U S WEST COMMUNICATIONS, INC. AND SOUTHERN BELL
TELECOM, INC.

DOCKET NO. 01T-013

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT
BETWEEN U S WEST COMMUNICATIONS, INC. AND TIME WARNER TELECOM
OF COLORADO, L.L.C.

DOCKET NO. 01T-019

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT
BETWEEN U S WEST COMMUNICATIONS, INC. AND MCLEOD USA
TELECOMMUNICATIONS SERVICES, INC.

PHASE I ORDER

Mailed Date: October 18, 2002
Adopted Date: October 16, 2002

I. BY THE COMMISSION

Background

On August 21, 2002, Qwest Corporation (Qwest) filed 11 motions for approval of amendments to interconnection agreements that had been entered into with various competitive local exchange carriers (CLECs), but had not been previously filed for approval. The motions indicated that Qwest requested "an order approving the attached agreements as amendments pursuant to 4 CCR 723-44.4."

According to Qwest, it proffered the agreements under a new policy of filing all contracts, agreements, or letters of understanding between Qwest and CLECs that create obligations that meet the requirements of the Telecommunications Act of 1996 (Telecom Act) at 47 U.S.C. § 251(b) or (c). Qwest further indicates that the agreements filed here include contracts relating to services under § 251(b) or (c) with prospective obligations that have not been terminated or superseded by agreement, commission order, or otherwise.

By Decision No. C02-1044 issued September 20, 2002, we determined that before granting or rejecting the filed agreements, it was necessary, for purposes of these specific

agreements, to define what constitutes an "interconnection agreement" (ICA) under § 251, subject to state commission approval pursuant to § 252. We therefore created a two-step process to analyze the agreements in question.

First, we requested comments from the parties in the captioned dockets as to a definition of an ICA under 47 U.S.C. § 251. After consideration of the parties' comments, we anticipated applying a more considered definition of an ICA to the 11 filed agreements at issue here. If an agreement survived this initial scrutiny and qualified as an ICA under § 252, then that agreement was to be subject to part two of the analysis.

The second element of the analysis is to apply the Commission's new definition of an ICA and the rejection criteria outlined in § 252(e)(2)(A) and (B) to the 11 filed agreements to determine whether we should grant or reject a particular agreement. We request another round of comments to address this portion of the analysis. This set of comments shall be due by October 30, 2002 and reply comments shall be due November 5, 2002.

Findings

As we noted in our Decision No. C02-1044, just what constitutes an interconnection agreement under § 251 is a

prior, necessary question before we can consider approval or disapproval of an ICA under § 252 and Commission Rule 4 *Code of Colorado Regulations* 723-44.4. A definitive definition within the context of these 11 agreements is important to determine which of the agreements are within the scope of matters that require prior Commission approval under the 90-day process as set out in § 252(a).

In response to our order, Qwest, AT&T Communications of the Mountain States, Inc., SBC Telecom, Inc., WorldCom, Inc., Commission Staff, and the Colorado Office of Consumer Counsel submitted comments. The comments offered the respective parties' interpretation of what constitutes an ICA. The comments agreed that there is no explicit statutory definition for the term "interconnection agreement" in the Telecom Act. The parties did agree that requiring filing of interconnection agreements promotes the Telecom Act's stated goals of opening up local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms. The parties, with the exception of Qwest, also agreed that the definition of an ICA should be broad so as not to engage any impulse of Qwest to engage in discriminatory treatment.

In connection with this issue, on April 23, 2002, Qwest petitioned the Federal Communication Commission (FCC) for a declaratory ruling on the scope of mandatory filing requirements

set forth in § 252(a)(1) of the Telecom Act. On October 4, 2002, the FCC issued its Memorandum Opinion and Order.¹¹ There, the FCC provided a definition of an ICA holding that “an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to § 252(a)(1) (emphasis in original).”¹² The FCC included the caveat that it disagreed with Qwest’s assertion that the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to which the charges apply.¹³

The FCC explicitly declined to establish a comprehensive, in-depth interconnection agreement standard. Instead, the FCC offered a definition of a basic class of agreements that should be filed. It left it to the states to provide further clarity to incumbent local exchange carriers and requesting carriers concerning which agreements should be filed for approval.

Keeping in mind the parameters provided by the FCC, and taking into consideration the comments filed by the parties to this matter, we have determined a provisional definition of an

¹¹ *Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order FCC 02-276 in WC Docket No. 02-89.

¹² FCC 02-276 at ¶ 8, pp. 4-5.

¹³ *Id.*

interconnection agreement to be used exclusively within the context of these 11 dockets:

An interconnection agreement, for purposes of Section 252(e)(1) of the Telecommunications Act of 1996, is a binding contractual agreement or amendment thereto, without regard to form, whether negotiated or arbitrated, between an Incumbent Local Exchange Carrier and a telecommunications carrier or carriers that includes provisions concerning ongoing obligations pertaining to rates, terms, and/or conditions for interconnection, network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, or collocation.

It is important to note here that we are indeed mindful of the impact to business-to-business relationships and practices due to the breadth of such a definition. We are also mindful of the potential disincentives that may arise, especially with dispute resolution settlements should such agreements require filing with the Commission as interconnection agreements. We therefore reiterate that this definition is intended only as a provisional definition in order to determine the status of the agreements filed in these 11 dockets. Any formal definition adopted by this Commission in regard to interconnection agreements shall be through our rulemaking authority after ample opportunity for comment, testimony, and thorough scrutiny on our part.

We find that the agreements filed in these 11 dockets meet our provisional definition of an ICA and are therefore subject to the stage 2 process to determine whether to grant or reject the

individual agreements. As stated previously, we will again entertain comments on this phase of the process. All comments are due by October 30, 2002. The comments for stage 2 shall be directed to each individual ICA, and indicate whether we should grant or reject the ICA. Replies to the stage 2 comments shall be due by November 5, 2002.

II. ORDER

A. The Commission Orders That:

A provisional definition for an interconnection agreement shall be adopted as articulated above for the sole purpose of determining the status of the agreements filed in Docket Nos. 96A-287T; 97T-507; 98T-042; 98T-519; 99T-040; 99T-067; 99T-598; 00T-064; 00T-277; 01T-013; and 01T-019.

The motion of the Office of Consumer Counsel to accept late-filed reply comments is granted. Response time to the motion is waived.

This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING October 16, 2002.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

Index of Full Citations	
Short Citation	Full Citation
Commission Orders	
<i>Commission Order</i>	<i>In the Matter of U S WEST Communications, Inc. 's Statement of Generally Available Terms and Conditions</i> , Decision No. C01-1302, Commission Order, Docket No. 99A-577T (Mailed Date Dec. 21, 2001).
<i>COPUC Comments</i>	<i>In the Matter of Application by Qwest Communications International, Inc., for Provision of In-Region, InterLATA Services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming</i> , WC Docket No. 02-314, Comments of the Colorado Public Utilities Commission (October 15, 2002).
<i>COPUC Evaluation</i>	<i>In the Matter of Application by Qwest Communications International, Inc., for Provision of In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, and North Dakota</i> , WC Docket No. 02-148, Evaluation of the Colorado Public Utilities Commission (July 2, 2002).
<i>COPUC Phase I Order</i>	<i>In the Matter of the Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of the Interconnection Rates, Term, and Conditions with U S WEST Communications, Inc.</i> ; and ten other proceedings, Dockets No. 96A-287T, No. 97T-507, No. 98T-042, No. 98T-519, No. 99T-040, No. 99T-067, No. 99T-598, No. 00T-064, No. 00T-277, No. 01T-013, and No. 01T-019, Phase I Order, Decision No. C02-1183 (Mailed Date October 18, 2002).
<i>COPUC Reply Comments</i>	<i>In the Matter of Application by Qwest Communications International, Inc., for Provision of In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, and North Dakota</i> , WC Docket No. 02-148, Reply Comments of the Colorado Public Utilities Commission (July 29, 2002).

<i>COPUC Supplemental Comments</i>	<i>In the Matter of Application by Qwest Communications International, Inc., for Provision of In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, and North Dakota, WC Docket No. 02-148, Supplemental Comments of the Colorado Public Utilities Commission (August 28, 2002).</i>
<i>COPUC Supplemental Reply Comments</i>	<i>In the Matter of Application by Qwest Communications International, Inc., for Provision of In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, and North Dakota, WC Docket No. 02-148, Supplemental Reply Comments of the Colorado Public Utilities Commission (August 30, 2002).</i>
<i>Decision on Applications for Rehearing, Reargument, or Reconsideration</i>	<i>In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms and Conditions, Decision No. C02-636, Decision on Applications for Rehearing, Reargument, or Reconsideration, Docket No. 99A-577T (Mailed Date June 6, 2002).</i>
<i>Ruling on Applications for Rehearing, Reargument, or Reconsideration</i>	<i>In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms and Conditions, Decision No. C02-409, Ruling on Applications for Rehearing, Reargument, or Reconsideration, Docket No. 99A-577T (Mailed Date Apr. 17, 2002).</i>
Qwest Application	
<i>Qwest Application</i>	<i>Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming, In the Matter of Qwest Communications International Inc. Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming, WC Docket No. 02-314 (September 30, 2002).</i>